



***BEYOND THE FORMS – COMPLYING WITH
THE NEW LAWS AND
RESOLUTIONS TO MAKE THEM WORK***

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Marc D. Markel is a shareholder of the Texas law firm of Roberts Markel Weinberg PC with offices in Houston, Dallas, San Antonio, Sugar Land, and Austin. He attended South Texas College of Law and was licensed to practice law in 1979. He is Board Certified in Residential and Commercial Real Estate Law by the Texas Board of Legal Specialization and is a Member of the College of the State Bar of Texas. He is licensed to practice in all courts in the State of Texas, the U.S. Supreme Court, the U.S. District Court for the Southern, Northern, Western and Eastern Districts of Texas, and the U.S. Fifth and Eleventh Circuit Courts. Marc is also a certified mediator and acts upon request as an arbiter.

Marc is a member of the Texas College of Real Estate Attorneys; a charter member of the College of Community Association Lawyers; a member of the Houston, Fort Bend, Montgomery County, Bexar County, Dallas County, and American Bar Association. His name has been listed on the Texas Super Lawyers List for 2005 through 2011 for Real Estate. Marc is AV rated by Martindale Hubbell, a peer rated review which is the highest possible rating for both competence and ethics. His firm, Roberts Markel Weinberg PC is also AV rated and is listed on Martindale Hubbell's list of Preeminent Law Firms.

His Community Associations Institute experience includes: Greater Houston Chapter, Past President and Past Director, National – Member Board of Trustees 2003 – 2005, Member Business Partners Council 2004-2005, Past President, and Former Director of the Foundation for Community Association Research, past Chairman of the Presidents' Club, past Chairman of the Texas Legislative Action Committee and a past Member of the newly formed Texas Community Association Advocates Inc. board of directors and Chair of its Advisory Board.

STEPHANIE QUADE

Stephanie Quade is a shareholder and has been licensed to practice law in the State of Texas since 1998. Stephanie practices in the firm's Corporate, Transactional, and Litigation areas. Stephanie advises clients and supervises the creation of various entities with the Secretary of State and assists those clients in observing the required corporate formalities. She has assisted corporate clients in mergers, acquisitions and dissolution. Stephanie has had extensive experience in representing developers, builders and community associations. She has participated in the defense of numerous mortgage fraud cases. Stephanie is experienced in critical analysis of complex legal documents and cases. Many of the cases Stephanie defends involve voluminous documents which must be construed together and require in-depth analysis and great attention to detail. In her real estate developer and transaction practice, Stephanie's responsibilities include supervision of the creation and amendment of documents to encumber real estate. Stephanie has been a frequent author of continuing legal education materials on litigation and real estate topics for various bar organizations.

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Brady Ortego is a shareholder in the real estate law section of Roberts Markel Weinberg PC. His practice focuses on representing developers in acquisition of large tracts of land and guides them through the creation of master planned communities throughout Texas. Brady also counsels Boards of Directors of condominium associations, and both residential and commercial community associations through corporate issues, litigation avoidance, collection/foreclosure, bankruptcy and complex contractual negotiations. Brady also works with several lenders in providing financing to community associations for large scale improvement projects. Additionally, Brady oversees complex commercial real estate transactions.

Brady is the author of *"Impacts of Foreclosure: You have the Right but do You Want the Remedy?"* featured in *Facets* and the 2010 Fourth Quarter issue of *Community Association Living*.

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DISCLAIMER

This article is not intended to be relied upon as a final analysis in resolving legal questions regarding legislative requirements and compliance. The information presented herein is intended to identify some of the issues surrounding this matter. Due to the summary nature of the article, the level of detail necessary for a proper legal analysis of any particular situation cannot be reached. There is no substitute for a thorough review of the relevant statutes and cases of a particular jurisdiction and the facts of a particular case by an experienced and competent attorney.

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I. SCOPE

The scope of this paper is to summarize the recent changes to community association laws rather than to present a complete analysis of the law as it relates to restrictive covenants and the operation of community associations. The areas to be discussed apply primarily to single family homes and townhomes, unless otherwise indicated.

II. 82ND LEGISLATIVE SESSION

The 82nd legislative session resulted in sweeping changes to community association law. There were 5,796 bills filed, 1,379 (24%) of which were passed. There were approximately 140 community association bills filed, 19 (13.5%) were passed, 5 of which were bracketed. The stated purpose behind much of the legislation was to encourage transparency in the governing of community associations. The goals of limiting the financial burdens on associations, and allowing associations to govern themselves appear to have fallen short. The legislative changes have resulted in associations having to adopt numerous policies, and become aware of provisions in their governing documents that are no longer enforceable.

The following are some of the issues the new laws cover: foreclosure, open meetings, association records, payment plans, developer transition, solar energy devices, member's rights as to voting and running for board positions, notice of meetings, military notifications display of flags, display of religious items (this is not a complete list). Additionally, some of the bracketed bills have changed the counties to which they apply. The State Bar of Texas is in the process of promulgating forms that track the new statutes. However, the danger in using a set of forms to address all of the new legislative requirements is that one size does not fit all. Each community has its own unique set of governing documents, and has traditionally operated in ways that the members have come to expect. The forms that are discussed in this presentation attempt to aid the drafter in taking a step beyond the basic legislative requirements and the State Bar forms. Each policy, however, should be drafted with attention to the legislative changes, and at the same time with attention to the unique governing documents of the particular community.

This practitioner has identified some drafting traps related to these new legislative requirements and policies. Where possible, drafting tips are suggested for addressing these issues.

Drafting Trap:

Many associations have historically not recorded all of the governing documents, and as a consequence, there is often no central location of past policies. As a consequence, it is possible that newly drafted and adopted policies could create conflicts with known and unknown past policies. As you consider what should be recorded, be sure that all documents that effect the use of the properties [including the lots] and the operation of the association are located and

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recorded. Many associations in the past did not record their architectural guidelines, records retentions policy, inspection of records, collection policy, deed restriction enforcement policy, and many others but merely construed governing documents to be bylaws, restrictions and possibly rules and regulations. The issue to be considered now is if you want the document to be enforceable it must be recorded.

Drafting Tip:

In an effort to avoid creating confusion, or conflicts, the following is an example of language that can be inserted in each policy. The following is an example from a Flag Policy:

NOW THEREFORE, pursuant to the authority granted in Section 202.011 of the Texas Property Code, the Board of Directors, hereby adopts this Flag Display Policy, which shall run with the land and be binding on all owners and lots within the subdivision. This Policy replaces any previously recorded or implemented policy that addresses the subjects contained herein.

Drafting Trap:

Many drafters will adopt by reference the defined terms from the restrictive covenants, or other dedicatory instruments, to be used in policies. Unless great attention is paid to the defined terms in each unique set of restrictive covenants and dedicatory instruments, it is very easy to make mistakes by not capitalizing all of the correct terms.

Drafting Tip:

While, it is not necessary to adopt defined terms, it is recommended that a reference be made to the restrictive covenants. Including a reference to the restrictive covenants helps ensure that title companies will pick up these recorded documents, and that they will appear in the chain of title on the lots within the subdivision. The following is a sample of such a reference used in a Flag Policy:

WHEREAS, the property encumbered by this Flag Display Policy is that property initially restricted by the Declaration of Covenants, Conditions, and Restrictions for the ABC Subdivision, recorded under XYZ County Clerk's File No. 123456, as same has been or may be amended from time to time, and any other property which has been or may be annexed thereto and made subject to the authority of the ABC Community Association, Inc.

Drafting Tip:

In an effort to simplify the approval, adoption, and recording of the policies, the following is an example of a Certification that can be used as the last page on every policy. The use of this Certification will eliminate the need to draft, adopt, and record a Board Resolution adopting the individual policies, an entry in the Board meeting minutes approving the policy will

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2. Rain Barrels: If an association wants to have any enforceable restrictions, it must adopt an appropriate policy that complies with the legislation. Absent a policy, an association has no ability to control the location, number, size, or appearance of rain barrels.
3. Flags/flagpoles: If an association wants to have any enforceable restrictions, it must adopt an appropriate policy that complies with the legislation. Absent a policy, an association has no ability to control the type, size, location or number of flags and flagpoles. With a policy the association can limit the number of flag poles to one of a height of no greater than twenty feet.
4. Display of Religious Items: Owners are now permitted to display religious items on their door/door frame. If an association wants to limit the size of that display, it must adopt an appropriate policy that complies with the legislation. The association cannot limit the size to less than a total of twenty five square inches cumulatively for the item(s). The association can place additional limitations as to offensive content and safety issues.

B. REQUIRED

1. Document Retention: – The statute now requires an association to adopt a document retention policy. The statute includes a detailed list of the length of retention and which documents are required to be retained. However, many of the documents that flow through an associations records are not included in this list and it may include additional records in the policy and many also expand the number of years that documents are retained. The policy should also provide for destruction of the records no longer being retained.
2. Records Production & Copying Charges for Records: The statute now requires an association to adopt a policy setting out the cost for copying (as set out in the Texas Administrative Code “TAC”) the books and records that can be charged to owners. The time to provide the documents is also regulated. The applicable provision in the TAC is quite detailed and close attention should be paid to the ability to add administrative costs.
3. Collection Policy: The statute requires an association to adopt payment plan guidelines as part of a collection policy and sets out a statutorily required application of payments order. In adopting its payment policy it is recommended that the recorded policy is uniform and easy to enforce for all association members and their management team. Many management companies use software programs that may not track the statute and care should be taken to insure statutory compliance.

It should be noted that the required policies allow for very little creative drafting. The challenge is to draft a policy that complies strictly with the legislative requirements, but at the same time is one that the association board members, and the owners, will understand.

Drafting Trap:

Some of the policies allow the association to require prior architectural control review and approval. References to the review committee should strictly comply with the name of the

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committee vested with that review authority in the governing documents. Also be certain that the timing for approval/rejection and auto approval or rejection tracks the governing documents. This is another area where one size will not fit all.

C. SOLAR ENERGY DEVICES

During developer control, a developer is not required to allow solar panels to be installed on homes. The following is a sample of language that can be added, to address developer control, and also establishes the guidelines after developer control has terminated:

NOW THEREFORE, pursuant to the authority granted in Sections 202.010 and 202.011 of the Texas Property Code, the Board of Directors (the "Board"), hereby adopts this Solar Energy Devices and Roofing Materials Policy ("Policy"), which shall run with the land and be binding on all owners and lots within the subdivision. This Policy replaces any previously recorded or implemented policy that addresses the subjects contained herein.

I. SOLAR ENERGY DEVICES DURING DEVELOPMENT PERIOD

Pursuant to Texas Property Code §202.010, solar energy devices, including solar panels, are prohibited on any lot within the ABC subdivision during the development period.

II. SOLAR ENERGY DEVICES AFTER DEVELOPMENT PERIOD COMPLETE

Pursuant to Texas Property Code §202.010, after completion of the development period, solar energy devices, including solar panels, shall be restricted in the following manner:

[INSERT SOLAR PANEL POLICY PROVISIONS]

D. RAIN BARRELS

The following is additional language that is not prohibited by the statute, and can be included to control the size and appearance of rain barrels:

- *Rain Barrels may not exceed 42 inches in height, measuring from the ground to the top of the barrel;*
- *Rain Barrels that exceed a volume capacity of 50 gallons are not permitted;*

E. FLAGS AND FLAGPOLES

Intuitively, it would seem that the Flag Display Policy would be one of the easiest to draft. However, the wording of the statute is not easy to decipher. Additionally, many associations wish to allow seasonal or school spirit signs. The following two options for suggested language which allows the association to continue to permit certain displays:

Option One:

In addition to the one flagpole allowed above, owners may display one temporary freestanding flagpole with a U.S. flag (“Temporary Flag”) on their front yard for up to two days before and two days after the following dates: Independence Day, Memorial Day, Veterans Day, and September 11th. Temporary Flags must meet all of the applicable requirements set forth above.

Option Two:

This Flag Display Policy does not apply to property that is owned or maintained by the association. Furthermore, this Flag Display Policy does not apply to flags displayed as “School Spirit” flags, or flags displayed during various holidays (“Holiday Flags”) pursuant to the association’s agreement with a group or entity that uses such displays as a means of fundraising or support (including by way of illustration and not limitation: scouting groups or local school groups). The board has sole discretion in determining which School Spirit and Holiday Flags may be displayed, and the length of time of such display.

Boards have expressed concern over existing flag poles that may be in violation of the newly adopted Flag Policy. The following language can be used to “grandfather” existing flag poles:

It is not the intent of this Flag Display Policy to create a deed restriction violation for a permanently installed flagpole that was installed prior to the date this Flag Display Policy is recorded in the Official Public Records of Real Property of XXXXX County, Texas.

F. DOCUMENT RETENTION

The statute sets out a relatively short list of documents that are required to be retained. Attached here as Addendum No. 1 is the list as set forth in the statute which are also those included in the State Bar form. The statutory list clearly does not address all documents that an association has. Attached here as Addendum No. 2, is an expanded list that can be used if the association desires. The composition of the typical association board of directors will change from year to year; additionally, management companies may change over time. With these changes, some historic documents may no longer be retained or may be stored away in some unknown previous director’s attic. The following is suggested language that can be added to the Document Retention Policy, as “savings language” so that the association is not in violation of the statute as to historic documents:

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This policy covers all records and documents, regardless of physical form, and contains guidelines for how long certain documents should be kept and how records should be destroyed. This Document Retention Policy shall be effective on January 1, 2012, and shall apply to records generated on or after January 1, 2012.

Drafting Tip:

The retention chart, whether using the long or short version, can be attached to the policy as an exhibit. The following is suggested language that can be added to guide the association and/or its community manager as to documents that are not addressed in the chart, electronic records, and who has the responsibility of destroying the records.

The Association retains specific documents for the time periods outlined in the attached Exhibit "A." Documents that may not be specifically listed will be retained for the time period of the documents most closely related to those listed in the schedule. Electronic documents will be retained as if they were paper documents. Therefore, any electronic files that fall into one of the document types on the attached Exhibit "A" will be maintained for the identified time period.

The custodian of the records of Association is responsible for the ongoing process of identifying the Association's records which have met the required retention period and overseeing their destruction. Destruction of any physical documents will be accomplished by shredding. Destruction of any electronic records of the Association shall be made via a reasonable attempt to remove the electronic records from all known electronic locations and/or repositories.

It should also be considered if the association is not going to retain any paper copies of records to include in its policy that all association records are retained in electronic format only. If an association takes this course it should employ a document management system where the records are indexed for easy retrieval.

IV. OPEN MEETINGS, NOTICE

The statute offers some guidance on what is, and what is not a board meeting, as follows:

A Board meeting means a deliberation between a quorum of the voting Board of Directors or between a quorum of the voting Board of Directors and another person, during which Association business is considered and the Board of Directors takes formal action. A Board meeting does not include the gathering of a quorum of the Board of Directors at a social function unrelated to the business of the Association or the attendance by a quorum of the Board of Directors at a regional, state, or national convention, ceremonial event, or press conference, if formal action is not taken and any discussion of Association business is incidental to the social function, convention, ceremonial event, or press conference.

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There are now restrictions on the subject matter that can be discussed in an executive session:

- a. *Personnel;*
- b. *Pending or threatened litigation;*
- c. *Contract negotiations;*
- d. *Enforcement actions;*
- e. *Confidential communications with the association's attorney;*
- f. *Matters involving the invasion of privacy of individual owners;*
- g. *Matters that are to remain confidential by request of the affected parties and agreement of the board of directors*

Following an executive session, any decision made in the executive session must be summarized orally and placed in the minutes, in general terms, without breaching the privacy of individual owners, violating any privilege, or disclosing information that was to remain confidential at the request of the affected parties. The oral summary must include a general explanation of expenditures approved in executive session.

Additionally, notice of the subject matter to be discussed in executive session must be included in the notice of the meeting. Association board meetings must now be open to the members. When a board notices a meeting it should consider the action it intends to take and avoid notices of workshop type meeting where the agenda has approval of actions on an agenda. While it is not necessary for an association to adopt and record an open meetings policy, it may be helpful for the board to adopt a notice policy as to board meetings. The following is sample language that may be helpful in drafting a meetings notice policy:

NOW, THEREFORE, IT IS RESOLVED, that the following Board Meeting Notification Policy is hereby adopted by the board:

I. NOTICE OF BOARD MEETINGS

Owners shall be notified of regular or special Board meetings in the following manner:

1. *The notice shall contain the date, hour, place and general subject matter of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session.*
2. *The notice shall be provided at least 72 hours before the start of the meeting by posting the notice on the association's website; or*
3. *By mailing the notice to each property owners not later than the 10th day or earlier than the 60th day before the date of the meeting; or*
4. *By posting the notice at a conspicuous location within the subdivision.*

5. *The notice will be e-mailed to each owner who has registered their e-mail address with the association. Owners are responsible for keeping an updated e-mail address registered with the association.*

II. MEMBERS' TIME AT BOARD MEETING

The notice of regular or special board meetings may include the time set aside by the board for input from members as follows:

1. Purpose.

To set aside a special time prior to a regular board meeting for members to address the board in person and in a public forum, expressing their views and opinions on the affairs of the association and other matters of interest.

2. Policy.

Members' Time will be set at 0:00 p.m. (unless otherwise determined by the board president) prior to each regular board meeting, and will last no more than 30 minutes. At the end of Members' Time, the board meeting will begin and will be conducted pursuant to the agenda items.

3. Procedure.

a. Any member (or other party at the president's discretion) may address the board during Members' Time. Members wishing to speak should complete the form provided for that purpose before the start of the meeting, or request permission to speak before Members' Time ends.

b. The member must include their name, address, phone number, email and topic of discussion.

c. Each member will be allowed approximately 3 minutes to speak. Depending on the number of members wishing to speak, the president may adjust the time allotted for each member. A member may not yield his/her allotted time to any other person.

d. No member shall otherwise speak at any meeting unless recognized by the president.

e. Members shall refrain from obscenity, vulgarity, or any breach of respect. Improper or disrespectful conduct shall result in the immediate expiration of the member's allotted time and may result in the member's expulsion from the meeting.

4. Board's Role.

a. The president may address a member's comments, or allow another board member to address the comments as appropriate.

b. While some discussion between the member and the board may take place, a lengthy dialogue will be avoided.

c. The board may refer comments made during Members' Time for review or action, or to be placed on a future board agenda for discussion and/or action.

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d. Unless comments relate to matters already on the agenda, or the board adds the matter to the agenda, the board will not address the topic at the board meeting.

V. RESALE CERTIFICATES

Texas Property Code §207.003 with regard to resale certificates was amended during the last legislative session. The statute now provides that an association has ten business days to prepare and deliver a current resale certificate to the requesting owner (or their agent). Per the new legislative change, a resale certificate is current only if it was prepared within the previous 60 days. An association may not deliver a resale certificate that was prepared more than 60 days before delivery.

Per the new statutory provisions, an association may now ask a purchaser of a property that requests a resale certificate for reasonable evidence that the purchaser has a contractual or other right to acquire property in the subdivision. The association may require payment before beginning the process of providing a resale certificate, but may not process the payment until the certificate is available for pickup. The association may not charge a fee for the resale certificate if it is not provided within the 10th business day after receipt of the request.

The resale certificate must include the style and cause number of any pending lawsuit in which the association is a party. However, the new language excludes the obligation to include disclosure of a lawsuit relating to unpaid ad valorem taxes on an individual member of the association. With the new requirement to pursue foreclosures by the expedited judicial method it is possible that many updates of the litigation disclosure will be necessary.

The statute includes a list of issues that must be included in the resale certificate, and the documents required to be provided with the certificate. The following is suggested language that can be included in a resale certificate, which goes beyond the legislative requirements:

Limitation of Information.

The Association is not a party to the transaction pursuant to which the property is being sold/bought and is providing information contained in this Resale Certificate at the specific request of the Owner or on behalf of the Owner. The information provided and statements made in this Resale Certificate are limited to the Association's actual knowledge; the Association has not made any investigation beyond the information furnished, and will not update or supplement this Resale Certificate unless requested to do so if, subsequent to the date of this Resale Certificate, the Association receives notice or information which may change the information or statements contained in this Resale Certificate. Notwithstanding the completion of this Resale Certificate by the Association, any interested party is responsible for undertaking any due diligence such party deems to be appropriate in connection with the property and with respect to the information provided or statements made by the Association in this Resale Certificate. NOTHING CONTAINED HEREIN PROVIDES AND/OR

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WARRANTS THAT THE PROPERTY IS IN CONFORMANCE WITH FEDERAL OR STATE LAW, LOCAL LAW, CODES AND ORDINANCES, OR OTHER CONSIDERATIONS WHICH ARE NEITHER REVIEWED NOR APPROVED BY THE ASSOCIATION OR THE ARCHITECTURAL CONTROL COMMITTEE ("ACC") CREATED PURSUANT TO THE DECLARATION. THE ASSOCIATION AND THE ACC ARE NOT RESPONSIBLE AND MAY NOT BE HELD LIABLE FOR (I) THE STRUCTURAL INTEGRITY OR QUALITY OF ANY IMPROVEMENT OR MODIFICATION ON THE PROPERTY, (II) COMPLIANCE WITH GOVERNMENTAL REQUIREMENTS, OR (III) COMPLIANCE WITH ANY MECHANICAL OR ELECTRICAL DESIGN/REQUIREMENTS.

THE ASSOCIATION DOES NOT MAKE ANY REPRESENTATIONS REGARDING ELEMENTS OF, MATTERS REGARDING, OR ACTIVITIES/OPERATIONS AT THE PROPERTY THAT MAY NOT BE DETECTED AND/OR OBSERVED BY A VISUAL INSPECTION OF THE PROPERTY. IT IS THE PURCHASER'S RESPONSIBILITY TO FAMILIARIZE HIMSELF/HERSELF OR THEMSELVES/ITSELF WITH THE DEDICATORY INSTRUMENTS (AS THE TERM IS DEFINED IN THE TEXAS PROPERTY CODE) OF THE ASSOCIATION, INCLUDING THE DECLARATION, THE POLICIES, RULES AND REGULATIONS FOR THE ASSOCIATION, AND THE GUIDELINES OF THE ASSOCIATION.

THE ASSOCIATION IS NOT AND SHALL NOT, IN ANY WAY, BE CONSIDERED AN INSURER OR GUARANTOR OF SECURITY WITHIN THE SUBDIVISION OR THE PROPERTY.

THE INFORMATION CONTAINED HEREIN IS ACCURATE AS OF THE DATE IT IS ISSUED. IF THE CLOSING OF THE TRANSACTION IS DELAYED AN UPDATED CERTIFICATE SHOULD BE REQUESTED.

***Repairs by the Association.** The Association will not make any repairs to the Property or do anything else in connection with the property or the common area or common facilities unless required by the terms of the Declaration.*

VI. PRODUCTION OF ASSOCIATION RECORDS

Property Code §209.005 relates to an association's obligation to make its books and records available to owners for inspection and or copying. An owner, or their authorized representative, must submit a written request for access or information by certified mail with sufficient detail describing what books and records are affected by the request. The request must be sent to the association at the address contained in the most recently recorded Management Certificate. If inspection is requested, the association has ten days to send written notice of dates, during normal business hours, that the owner may inspect. If copies are requested, the association has ten business days after the date the association receives the request to produce the requested records. If the association is unable to produce the records on or before the 10th

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business day after receipt of the request, it must inform the owner that it is unable to produce the information and state a date by which it will be able to produce the information, which date must be on or before the 15th day the association receives the request.

The association may produce the records requested in hard copy, electronic, or other format reasonably available to the association. The costs for copies is controlled by 1 T.A.C. §70.3. The association may not charge the owner for copies unless it has adopted a records production and copying policy. The association may require advance payment of copying costs, however, if the estimated costs are greater or lesser than the estimate, the difference must appear on a invoice to the owner. The invoice must be issued on or before the 30th day after the date the information was delivered to the owner.

Attorney's files are not considered to be association records. Additionally, the association is not required to release or allow inspection of any books or records that identify the dedicatory instrument violation history of an individual owner, an owner's personal financial information, including payment or nonpayment of amounts due the association, the owner's contact information – other than the owner's address, or information related to an employee of the association, including personnel files. An association may release information as to an individual owner, if that owner has given the association express written approval to release the requested information.

VII. DECLARANT CONTROL PERIOD

A declaration may provide for a period of declarant control during which the declarant may appoint and remove all of the board members other than board members elected by the members of the association. Regardless of the period of declarant control that is stated in the declaration, §209.00591 now sets out the time period when a declarant must allow one-third of the directors to be elected by the members, as follows:

- On or before the 120th day after the date 75% of the lots that may be created and made subject to the declaration are conveyed to owners other than a declarant; or
- If the declaration does not include the number of lots that may be created and made subject to the declaration, at least one-third of the board members must be elected by owners other than the declarant no later than the 10th anniversary of the date the declaration was recorded.

It has not been the standard in the industry to include the number of lots that may be created in declarations. If the declarant retains enough votes, or the authority, to unilaterally amend the declaration, the following sample language may be used to clarify the original declaration to include the number of anticipated lots, in order to extend the declarant control period at least until the declarant has sold 75% of the lots:

**CLARIFICATION TO THE DECLARATION OF COVENANTS,
CONDITIONS AND RESTRICTIONS FOR XYZ SUBDIVISION**

WHEREAS, Article ____, of the Declaration vests the Declarant with the unilateral right at any time, and from time to time, to amend the Declaration to correct errors or omissions for so long as Declarant control period exists; and

WHEREAS, the Declarant control period has not expired within the XYZ Subdivision; and

WHEREAS, Declarant desires to clarify the number of Lots that may be created and made subject to the Declaration.

NOW THEREFORE, Declarant hereby declares that the number of residential lots that may be created in the XYZ Subdivision and made subject to the Declaration, is Two Thousand Five Hundred (2,500).

When drafting a declaration, the following is sample language can be used to address the period of Declarant control:

Declarant shall retain the control and authority to appoint all members of the Board of Directors of the Association until the earlier to occur of the following:

- (1) On or before the 120th day after the date that seventy-five percent (75%) of the lots that may be created and made subject to the Declaration are conveyed to owners other than the Declarant; at which time one-third (1/3) of the board members must be elected by the owners other than the Declarant; or*
- (2) From and after the tenth (10th) anniversary of the date this Declaration is recorded in the Real Property Records of _____ County, Texas; at which time one-third (1/3) of the board members must be elected by the owners other than the Declarant; or*
- (3) The Declarant assigns to the Association its control and authority to appoint all members of the Board of Directors of the Association. If such assignment occurs prior to the termination of Declarant's control under Subsections (1) and (2) immediately above, the assignment must be evidenced by an instrument recorded in the Real Property Records of _____ County, Texas.*
- (4) Declarant shall retain the control and authority to appoint two-thirds (2/3) of the members of the Board of Directors of the Association until such time as Declarant no longer owns any portion of the property.*

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Upon termination of Declarant's control and authority to appoint two-thirds (2/3) of the members of the Board of Directors of the Association, any remaining Class B Members shall be converted to Class A Members and elections shall be held to elect the members of the Board of Directors of the Association pursuant to the provisions of the Certificate of Formation and the Bylaws of the Association. In the event Class B Membership terminates pursuant to the above provisions, and thereafter additional property is annexed into the jurisdiction of the Association, which results in the Declarant owning property in the Subdivision, Declarant's Class B Membership shall be restored until it again terminates as specified in (1), (2), (3), or (4) above. Notwithstanding anything contained herein to the contrary, the Declarant may assign, temporarily or permanently, all or a portion of its rights as Declarant to any person(s).

VIII. EXPEDITED FORECLOSURE

One of the key statutes implemented as a result of Texas' 82nd legislative session pertains to the manner in which a property owners association ("POA") may conduct a foreclosure sale under Chapter 209 of the Texas Property Code (the "Code"). Section 209.0092 of the Code now requires POAs to first obtain a court order in an application for expedited foreclosure under the rules adopted by the Texas Supreme Court. On January 1, 2012, the Texas Supreme Court adopted rules establishing expedited foreclosure proceedings by amending Texas Rules of Civil Procedure 735 and 736 for use by POAs in foreclosing their assessment liens.

A. Judicial Foreclosure vs. Expedited Foreclosure

TRCP 735 was amended to specifically include liens for POAs under Section 209 of the Code. TRCP 735.3 provides that a Rule 736 order is not a substitute for a judgment for judicial foreclosure, but any POA lien that may be foreclosed using Rule 736 procedures may also be foreclosed by judgment in an action for judicial foreclosure. Reading TRCP 735.3 and Section 209.0092 of the Code together yield a potential inconsistency. A plain reading of Section 209.0092 of the Code provides that a POA's lien may not be foreclosed "unless the association first obtains a court order in an application for expedited foreclosure." Section 209.0092 of the Code makes no mention of a judicial foreclosure action as an alternative to expedited foreclosure. It is clear that the intent of TRCP 735.3 was to give POAs a choice between submitting an application for expedited foreclosure and filing a judicial foreclosure action. While we are of the opinion that it may not have been the intent of the legislature to exclude an action for judicial foreclosure in Section 209.0092 of the Code; a plain reading provides for such exclusion. Applying a conservative approach, POA counsel may either pursue an expedited foreclosure or counsel may file a judicial foreclosure action adding the application under 209.0092 of the Code as an additional request for relief.

Drafting Tip: In the event a judicial foreclosure action is filed, POA counsel should include a reference to TRCP 735.3.

B. Application Contents and Requirements

The application for an expedited order must be filed in the county in which all or part of the real property encumbered by the POAs line is located. The style of the application must be “In re: Order for Foreclosure Concerning [state: property’s mailing address] under Tex. R. Civ. P. 736.”

As to the contents of an application for expedited foreclosure, TRCP 736.1(d) provides a detailed list of all the information that counsel must include. The contents of the application under TRCP 736.1(d)(1) through (6) are as follows:

- (1) Identify the name and last known address of the Petitioner and the Respondent;
- (2) Identify the property encumbered by the POA lien sought to be foreclosed by its commonly known street address and legal description;
- (3) Describe or state:
 - A. The POA lien sought to be foreclosed and the statutory reference;
 - B. The authority of the POA as the entity with the authority to prosecute the foreclosure;
 - C. Each person obligated to pay the POA lien;
 - D. Each mortgagor, if any, of the POA lien sought to be foreclosed who is not a maker or assumer of the underlying debt;
 - E. As of the date that is not more than sixty (60) days prior to the date the application is filed:
 - i. If the default is monetary, the number of unpaid scheduled payments;
 - ii. If the default is monetary, the amount required to cure the default;
 - iii. If the default is non-monetary, the facts creating the default; and
 - iv. If applicable, the total amount required to pay off the POA lien;
 - F. The requisite notice to cure the default has been mailed to each person as required under applicable law and the POA lien and that the opportunity to cure has expired;
 - G. That before the application was filed any other action required under applicable law and the POA lien was performed.
- (4) Conspicuously state:
 - A. That legal action is not being sought against the occupant of the property unless the occupant is also named as a respondent; and
 - B. That if the petitioner obtains a court order, the petitioner will proceed with a foreclosure of the property in accordance with applicable law and the terms of the POA lien.

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- (5) Include an affidavit of material facts in accordance with Rule 166a(f) signed by the petitioner or servicer describing the basis for foreclosure and attach a legible copy of:
 - A. The pertinent part of the POA declaration or dedicatory instrument establishing the lien;
 - B. Each notice required to be mailed to any person under applicable law and the POA lien and proof of mailing of each notice.

Drafting Tip: The POA declaration or dedicatory instrument that is attached to the affidavit of material facts must be a certified copy. TRCP 166a(f) requires attachment of sworn or certified copies of all papers or parts thereof referred to in the affidavit. So while the statute only requires pertinent part of the POA declaration or dedicatory instrument establishing the lien to be attached it is not certain how one gets a certified copy of a portion of a document.

C. Inclusion of Non-Record Owner Spouses

It is important to note that TRCP 736 may require counsel to include spouses listed in the deed of trust but not listed on the conveyance deed. TRCP 736.1(d)(1)(B)(iii) defines Respondent as it relates to POAs as “each person obligated to pay the loan agreement, contract, or lien sought to be foreclosed who has a current ownership interest in the property.” In light of the potential that spouses listed on a deed of trust may have a community property interest in the property at issue, this provision may be read to require POAs to include non-record owner spouses as Respondents under TRCP 736.1.

D. Prerequisites to Application Filing

One key note on a prerequisite to the filing of an application for expedited foreclosure: TRCP 736.1(c) provides that an application may not be filed until the opportunity to cure has expired under applicable law or the POA lien sought to be foreclosed. Not only must POA counsel confirm that any relevant cure period provided in covenants has expired, but counsel should confirm that the notice under Section 209.0064 of the Code has been sent.

Section 209.0064 of the Code statute provides that as a condition to the charging of the fees of a debt collector (including law firms) to an owner’s account, specific notice must be sent via certified mail return receipt requested. Notice under Section 209.0064 of the Code must specify each delinquent amount and the total amount of the payment required to make the account current. The notice must describe the options the owner has to avoid having the account turned over to a collection agent or law firm, including the availability of a payment plan. Section 209.0064 of the Code provides that owners must be given thirty (30) days to cure the delinquency before further action is taken. If the notice requirements under Section 209.0064 of the Code are not satisfied, then a POA may not hold an owner liable for the fees of a collection agent or law firm. Additionally, the failure to send notice under Section 209.0064 of the Code may prohibit the filing of an application for expedited foreclosure.

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Drafting Tip: This letter is better sent by the POA or its management. If the letter under 209.0064 is sent by POA counsel, the fees incurred for its preparation are not chargeable to the owner's account and the POA may not recoup the fees.

Drafting Tip: POA counsel should ensure that a total for each category of delinquent charge is provided within the body of the notice or, in the alternative, the owners are provided detailed account history as an attachment to the notice under 209.0064 of the Code starting from a zero balance. The current State Bar Forms provide a space for inclusion of a total of each category of charges; however, not all POA accounting systems permit convenient inclusion of this data.

Drafting Tip: The current State Bar form for collection of fees under Section 209.0064 of the Code states that the owners will have thirty (30) days from the date of receipt of the notice to cure the delinquency. Given that the date of receipt can be an evidentiary hurdle, the better approach is to allow thirty (30) days from the date of the notice.

Section 209.0091 of the Code titled "Prerequisites to Foreclosure: Notice & Opportunity to Cure for Certain Other Lienholders" could be considered a prerequisite to the submission of an application for expedited foreclosure. Section 209.0091 of the Code provides that a POA may not foreclose its assessment lien under Section 51.002 of the Code or commence a judicial foreclosure action unless notice of the total amount of the delinquency giving rise to the foreclosure, i.e., lienable debt, to any other holder of a lien of record on the property whose lien is inferior or subordinate to the association's lien and is evidenced by a deed of trust. The recipient must be given an opportunity to cure the delinquency before the 61st day after the date the recipient receives the notice. Notice under Section 209.0091 of the Code must be sent via certified mail, return receipt requested to the address for the lienholder shown in the deed records.

Drafting Tip: Section 209.0091 of the Code provides that the POA must send notice of the total amount of the delinquency "giving rise to the foreclosure." It is not clear whether the current State Bar forms intend to differentiate between lienable versus nonlienable charges. POA counsel should analyze covenants and determine how much of the total balance is secured debt and includable in the notice under Section 209.0091 of the Code.

As an additional prerequisite to the filing of an application for expedited foreclosure, POA counsel should confirm that the delinquent owners have been given the opportunity for a payment plan or alternative payment schedule under Section 209.0062 of the Code. As previously mentioned, Section 209.0062 provides that POAs must adopt guidelines that allow owners the opportunity to enter into a payment plan. The reference in TRCP 736.1(d)(3)(G) to satisfaction of any other action required under applicable law would then make the offer of a payment plan a prerequisite to the filing of an application for an expedited foreclosure.

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E. Waiver of Expedited Foreclosure

Section 209.0092(c) does allow owners of property to agree in writing at the time the foreclosure is sought to waive the requirement of an expedited foreclosure. The waiver may not be required as a condition of the transfer of title to real property.

Drafting Tip: POA counsel should consider including a waiver provision in any payment plan entered with the owner at the time the foreclosure is sought.

G. Service of the Application—TRCP 736.3

When the application is filed, the clerk will thereafter issue a separate citation for each respondent named in the application and one additional citation for the occupant of the property sought to be foreclosed. The clerk of the court must serve each citation, with a copy of the application attached, by both first class mail and certified mail to the last known address that is stated in the application.

The clerk must complete a return of service in accordance with TRCP 107 without the requirement of a return receipt. The date of service is the date and time the citation was placed in the custody of the U.S. Post Service in a properly addressed, postage prepaid envelope in accordance with the clerk's mailing procedures. The clerk may charge one fee per respondent.

F. Response to Application

A response to the application is due the first Monday after the expiration of 38 days from the date the citation was placed in the custody of the U.S. Post Service in accordance with the clerk's mailing procedures. The response must be signed in accordance with TRCP 57. While a general denial under TRCP 92 is permissible, the respondent must affirmatively plead the following:

- (1) Why the respondent is not obligated for payment of the POA lien;
- (2) Why the number of months of alleged default or the reinstatement or the payoff off amounts are materially incorrect;
- (3) Why any document attached to the application is not a true and correct copy of the original; or
- (4) Proof of payment in accordance with TRCP 95.

The court must conduct a hearing if a response is filed after reasonable notice to the parties. The hearing may not be held earlier than twenty (20) days or later than thirty (30) days after a request for a hearing is made by any party. The petitioner has the burden to prove by affidavits on file or evidence presented the grounds for granting the order sought in the application.

If no response is filed by the due date, the petitioner may file a motion and proposed order to obtain a default. All facts alleged in the application and supported by the affidavit of material facts constitute prima facie evidence of the truth of the matters alleged. The court must grant the application by default order no later than thirty (30) days after a motion is filed if the

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application complies with TRCP 736.1 and was properly served under TRCP 736.3. The petitioner's appearance in court is not required to obtain a default.

The court must issue an order granting the application if the petitioner establishes the basis for the foreclosure. Otherwise, the court must deny the application. The order granting the application must describe the following:

- (1) The material facts establishing the basis for foreclosure;
- (2) The property to be foreclosed by commonly known mailing address and legal description;
- (3) The name and last known address of each respondent subject to the order; and
- (4) The recording or indexing information of the POA lien to be foreclosed.

An order granting or denying the application is not subject to a motion for rehearing, new trial, bill of review, or appeal. If the order is challenged, suit must be filed in a separate, independent, original proceeding in a court of competent jurisdiction. After the order is obtained, POA counsel may proceed with the foreclosure process under applicable law and terms of the POA's lien.

If a respondent filed for bankruptcy at any time before the order is signed and provides proof to the clerk of the court that respondent filed, the proceeding for expedited foreclosure is abated so long as the automatic stay is effective.

Drafting Tip: Pursuant to TRCP 736.12, a conformed copy of the order must be attached to the trustee or substitute trustee's foreclosure deed.

IX. CONCLUSION

The new legislation should be carefully and strictly complied with. However, as pointed out herein, there are certain provisions that can be added to the policies to make the administration of a community association's policies somewhat easier.

ADDENDUM NO. 1 DOCUMENT RETENTION POLICY			
DOCUMENT TYPE	DEFINED	TIME PERIOD	EXCEPTION
Account Records of Current Owners	Member assessment records	Five (5) years	Unless period of ownership exceeds five (5) years, then retain last five (5) years.
Audit Records	Independent Audit Records	Seven (7) years	
Bylaws	And all amendments	Permanently	
Certificate of Formation	And all amendments	Permanently	
Contracts	Final contracts between the Association and another entity.	Later of completion of performance or expiration of the contract term plus four (4) years	
Financial Books & Records	Year End Financial Records and supporting documents	Seven (7) years	
Minutes of Board & Owners Meetings	Board minutes and written consents in lieu of a meeting; Annual member meetings	Seven (7) years	
Restrictive Covenants	And all amendments	Permanently	
Tax Returns	Federal and State Income, Franchise Tax Returns and supporting documentation	Seven (7) years	

ADDENDUM NO. 2 DOCUMENT RETENTION POLICY			
DOCUMENT TYPE	DEFINED	TIME PERIOD	EXCEPTION
ACCOUNTS PAYABLE/ RECEIVABLE	Accounts payable, accounts receivable support ledgers	Seven (7) years	
ACCIDENT / SAFETY REPORTS (CLAIMS SETTLED)	Accident reports and insurance claims	Seven (7) years	Claims of minors should be retained 7 years or at until the minor turns 21, whichever is longer
ACCIDENT REPORTS (WORKERS COMP)	Accident reports and insurance claims for workers compensation injuries	Seven (7) years	Unless employee is disabled, for longer period of time in which case a period of disability plus 4 years.
ASSESSMENT RECORDS	Member assessment records	Period of ownership plus two (2) years	Unless period of ownership exceeds five (5) years, then retain last five (5) years.
AUDIT RECORDS	Independent Audit Records	Seven (7) years	
BANK STATEMENTS	Statement of financial accounts, deposit tickets, cancelled checks, reconciliation statements.	Seven (7) years	
BOARD PACKAGES	Documentation delivered to the Board prior to meetings. Temporary, intermediate documents used to develop final deliverable documents.	After Meeting	
BUDGETS	Association budgets	Seven (7) years	
COMMITTEE CHARTERS	Committee charters,	Indefinitely	

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ADDENDUM NO. 2 DOCUMENT RETENTION POLICY			
DOCUMENT TYPE	DEFINED	TIME PERIOD	EXCEPTION
COMMITTEE REPORTS	Committee reports	Four (4) years	
CONTRACTS	Final contracts between the Association and another entity.	Later of completion of performance or expiration of the contract term plus four (4) years	
CONTRACT BID PROPOSALS/ SPECIFICATIONS	For contract proposals not entered into by the Association.	Two (2) years	
CORPORATE FINANCIAL RECORDS AND BOOKS	Year End Financial Records and supporting documents	Seven (7) years	
CORPORATE GOVERNANCE DOCUMENTS	Plats, Articles of Incorporation, By Laws, Restrictions, Rules, Regulations, Policies and Guidelines and all amendments thereto, deeds, easements.	Indefinitely	
CORRESPONDENCE	Correspondence relating to general matters	Four (4) years	
CORRESPONDENCE-MEMBERS	Correspondence to/from members – kept in member file	Two (2) years	
DEEDS	Deed records relating to common areas which are recorded in the real property records.	Indefinitely	
DEED RESTRICTION ACTIVITY RECORDS	Member deed restriction activity records	Period of ownership plus two (2) years	Unless period of ownership exceeds five (5) years, then retain last five (5) years.
DEPRECIATION SCHEDULES		Life of asset plus four (4) years	In any event not less than seven (7) years

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ADDENDUM NO. 2 DOCUMENT RETENTION POLICY			
DOCUMENT TYPE	DEFINED	TIME PERIOD	EXCEPTION
EASEMENT AGREEMENTS	Easements between the association and another entity.	Indefinitely	
EMPLOYEE APPLICATIONS	Applications from employees who were not hired.	Four (4) years	
EMPLOYEE RECORDS	Payroll records, application, tests, performance appraisals, rate position changes, transfer, promotions, demotions, disciplinary actions, job descriptions, employee benefit plan documents, time records, employment retirement income security act, personnel records and records relevant to employee claims of discrimination.	Employee's employment period plus six (6) years	
ENTERTAINMENT RECORDS		Seven (7) years	
ENVIRONMENTAL RECORDS	Permits, authorizations, safety data, material disposal, waste disposal.	Discard on a case-by-case basis upon consultation with the Association's attorney	
EXPENSE REPORTS		Seven (7) years	
FINAL DOCUMENTS	Final deliverable documents which are not superseded or incorporated into later documents.	See Document Type	Contract drafts have benefit as they can help clarify contract terms negotiated which may later be disputed.
INSURANCE RECORDS – POLICIES & CLAIM RECORDS	All insurance policies and records of claims.	Indefinitely	

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ADDENDUM NO. 2 DOCUMENT RETENTION POLICY			
DOCUMENT TYPE	DEFINED	TIME PERIOD	EXCEPTION
IRA, KEOGH PLAN	Contributions, rollovers, transfers and distributions	Indefinitely	
JUDGMENTS	Court Judgments	Until judgment amount is paid in full. Judgments can be renewed every ten (10) years.	
LABOR CONTRACTS	Contract for labor or employment	Contract period plus four (4) years	
LEASES	Leases relating to equipment	Lease term plus four (4) years	
LOAN DOCUMENTS	Documents relating to loans plus security agreements	Until the loan is fully discharged plus four (4) years	
MEETING TAPE OR VIDEO RECORDS	Video or audio tape of meetings-strongly advise against these	If made, destroy prior to next meeting	See Meeting Minutes if used as same
MEMBER OR OWNER RECORDS	Member or Owner voting lists or Name, address, telephone, and email address.	Period of ownership plus two (2) years	Unless period of ownership exceeds five (5) years, then retain last five (5) years
MINUTES - BOARD OF DIRECTORS	Board minutes and written consents in lieu of a meeting.	Seven (7) years	
MINUTES – COMMITTEES	No committee minutes should be taken only reports to the board	See Committee Reports	
MINUTES – MEMBER MEETINGS	Annual member meetings	Seven (7) years	
MINUTES - EXECUTIVE SESSION MEETINGS	Executive session meeting minutes	Seven (7) years	
NEWSLETTERS	Newsletter or inserts sent to association members	Five (5) years	

ADDENDUM NO. 2 DOCUMENT RETENTION POLICY			
DOCUMENT TYPE	DEFINED	TIME PERIOD	EXCEPTION
OPINION LETTERS OR REPORTS	Prepared by professionals including attorney, accountant, engineer	Indefinitely	
OWNER INFORMATION	Current name and address of each owner	Updated continually	
PURCHASE ORDERS		Four (4) years	
REPORTS	Reports relating to property damage and accidents	Seven (7) years	Claims of minors should be retained for the later of seven (7) years or at until the minor turns 21
RESERVE STUDIES	Documents relating to study of common area and amount of funds necessary to fund upkeep, maintenance and replacement	Time period for which the reserve study covers, plus four (4) years statute of limitations period	
TAX RETURNS	Federal and State Income, Franchise Tax Returns and supporting documentation	Seven (7) years	
TEMPORARY DOCUMENTS	Intermediate documents used to develop final deliverable documents	Until final deliverable documents are completed	Contract drafts may be beneficial to help clarify later disputed negotiated contract terms
TRADEMARKS	Documents relating to the first use of the trademarks should be retained as long as they are used. Registered trademarks can be renewed every ten years.	Indefinitely, so long as trademarks are still in use	

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ADDENDUM NO. 2 DOCUMENT RETENTION POLICY			
DOCUMENT TYPE	DEFINED	TIME PERIOD	EXCEPTION
VENDOR INVOICES	Invoices associated with final contracts between the Association and another entity	Later of completion of performance or expiration of the contract term plus four (4) years for statute of limitations for any action relating to a breach of contract.	
VOTING RECORDS	Association board member election records including proxies and ballots	One (1) year	Unless election is contested, then retain for period of contest
WATER WELL-RELATED	Well reports, etc.	Two (2) years	
WORKERS COMPENSATION RECORDS	Covered employees are eligible for lifetime benefits	Indefinitely	